STATE OF MICHIGAN

COURT OF APPEALS

SUSAN PETE DAVIS, Plaintiff-Appellee,	UNPUBLISHED December 23, 2014
v	Nos. 318390 & 319128 Oakland Circuit Court
CLAUDE THOMAS DAVIS, Defendant-Appellant.	LC No. 2012-803093-DO

Before: BORRELLO, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's opinion and corresponding judgment of divorce. We affirm.

I

Plaintiff and defendant met at Clemson University (in South Carolina), where plaintiff was studying for, and eventually received, a Master of Wildlife Biology degree and defendant was studying for, and eventually received, a Master of Fine Arts degree. They married on December 10, 1982.

A

Plaintiff testified that it was their expectation that both defendant and plaintiff would work to support each other during their marriage, and defendant admitted that, before they were married, plaintiff said she could not support him. After graduating, both parties obtained jobs that were not directly related, or did not require, their master's degrees. Plaintiff testified that she was willing to work outside her chosen field to support her family. The parties relocated from their home in Anderson, South Carolina in 1990, after plaintiff obtained a job in the environmental field.

Although defendant also obtained a new job at a museum, he was terminated and only obtained temporary work for a short time thereafter. When the parties' first daughter, Claire,

was born in 1992, they decided defendant would stay home with her because he was earning little more than the cost of daycare. The parties' second daughter was born in 1994.[1]

Around 1997, plaintiff was laid off, but she obtained a new position that required the family to relocate to Ann Arbor. Plaintiff worked 50 to 60 hours per week and she had an hour commute each way from the home they eventually bought in Manchester. Plaintiff also testified that she worked on weekends and traveled 25 percent of the time. When the children went to elementary school, plaintiff pursued an MBA.

In 2011, plaintiff lost her job. While she looked for work, she opened a consulting company. After about six months of unemployment, plaintiff was hired at an automotive company. The new job required the family to sell their home in Manchester and relocate. She earns $112,000 per year, but in 2013, she received a $12,000 bonus.

Defendant never returned to work. Defendant testified that, when the children went to school, he wanted to get a job, but plaintiff told him that the children needed him more at home and she did not care if he ever went back to work. Although defendant claimed that he wanted to be a breadwinner, he also claimed that he was too busy to work because of the children's extra-curricular activities. Plaintiff testified differently that she did not expect defendant to be out of work long-term, and throughout the marriage, she encouraged defendant to return to work "many times," but defendant responded angrily and defensively.

Defendant testified that he had made no attempts to update his job skills and did nothing to find work during the divorce proceedings. Although he claimed he would seek work after the divorce, he had no idea what type of work he could find, particularly in light of the facts that he has bad knees and suffers from anxiety and depression. Defendant's psychologist, who he consulted after the couple's separation, testified that she had encouraged defendant to go to Michigan Rehab Services, which could help him with employment despite his physical disability, but the psychologist opined that work did not seem like a priority to him at that time.

B

Defendant testified that his job at home was "24/7." He cooked, shopped, and repaired and maintained the house and lawn. According to defendant, plaintiff did nothing around the house or to help care for the children, except change the occasional diaper, give a bath, and pay the bills. Plaintiff testified differently. Although plaintiff estimated that defendant did 85% of the everyday housework, she testified that many of these tasks were completed because of the prodding and lists she provided to defendant. In addition, plaintiff testified that she did the deep-cleaning, sorted clothes for the seasons, removed clutter, and organized on the weekends. Moreover, plaintiff testified that, when she got home after a full day of work, defendant would relax and plaintiff would take care of the children. On the weekends, she brought the children to work. They played while she worked. Moreover, it was not unusual that plaintiff would be called at work to help mediate disputes between defendant and the children.

[1] At the time of the divorce, Claire was 20 years old and Lillian was 18 years old.

C

Defendant's psychologist testified that, during an intake interview, defendant admitted that he has anger issues and he was physically violent—having taken six "swings" at his family. At trial, defendant admitted to arguments, but not physical violence.

Plaintiff testified that, in 1992, when she was pregnant with Claire, defendant threatened her. Following an argument in 1995, defendant raised his fist back, and said, "What if I knock your F-ing teeth out?" Defendant also threatened to shoot a teen-aged driver who drove too fast through their neighborhood and he grabbed Claire by the back of the neck when she did not wash the dishes the way he instructed.

In October 2012, defendant asked Claire to use her car to jump the battery on his car. She refused. Defendant was furious and he called plaintiff, who was at work. Defendant testified that Claire reached and tried to grab for the phone while defendant was talking to plaintiff. He further testified that he swung at Claire with a closed fist, intending to "slap her hands away." Following this incident, Claire obtained a PPO and plaintiff asked defendant to leave the house so Claire would feel safe. Plaintiff testified that the couple would still be married if defendant had not threatened Claire. Defendant's psychologist opined that he was an emotional batterer.

D

Plaintiff received two inheritances during the marriage and used them to establish college funds for the children and to buy a car for plaintiff, a shed, and a cover for defendant's truck bed. Defendant testified that his mother died after the couple separated. He received $177,000, but owed some money back to the estate ($8,000).

E

In its opinion, the trial court found that the marriage was irreparably broken at the time of the incident involving the car battery and Claire. The trial court found, "this was not a typical 'stay at home' parent situation . . . Plaintiff was a full time mother in addition to working full time and was responsible for many things in the household." The trial court found plaintiff very credible, noting her testimony that she "made every effort to provide for her family as a sole bread winner while still making every effort to be available as a mother to the parties' two daughters." The trial court found defendant's testimony was not credible, citing inconsistencies in his testimony regarding why he did not work (disabled or cared for children) and then other testimony regarding his desire to work. The trial court awarded the house and associated debts to plaintiff and divided equally the remaining assets and debts except for a hotel debt incurred during the separation and the inheritance from defendant's mother, which were assigned to defendant.

The trial court also found that defendant had stopped working to care for the children, but had refused to work—despite plaintiff's urging—for years since the youngest child was in middle school, that defendant's employment was a point of contention during the marriage, and that defendant failed to work even after the couple separated. Although the trial court found defendant had bad knees, depression, and anxiety, it concluded that since he had not been

diagnosed with a disability, and since his therapist recommended work as a part of defendant's treatment plan, defendant was in fact able to work. The trial court found that defendant had $1,161 in expenses per month, including: rent ($490); cable ($85); electric ($36), food ($80), loan ($10), dry cleaning ($10-15), whereas plaintiff had $6,900 in expenses per month, including expenses for college-aged daughters. Plaintiff agreed to pay $500 to $600 per month for defendant's COBRA. The trial court awarded $1,020 per month for two years to defendant for spousal support. In making this award, the trial court held that it was mindful of defendant's recent inheritance of approximately $177,000.00 and his ability to work. In Docket No. 318390, defendant filed a claim of appeal from this opinion.

Plaintiff moved for entry of a judgment of divorce, which the trial court entered. In Docket No. 319128, defendant also filed a claim of appeal from the judgment.

II

Defendant first argues that the trial court made clearly erroneous factual findings. We disagree. "This Court reviews the trial court's findings of fact for clear error." *Korth v Korth*, 256 Mich App 286, 288; 662 NW2d 111 (2003). "[A] finding is clearly erroneous when, on review of the whole record, this Court is left with the definite and firm conviction that a mistake has been made." *Logan v Manpower of Lansing, Inc*, 304 Mich App 550, 555; 847 NW2d 679 (2014) (citation and quotation marks omitted).

A

Defendant claims that the trial court clearly erred by finding that this was not a typical stay-at-home parent situation and that plaintiff was a full-time mother. Defendant incorrectly claims that the trial court's characterizations equate to findings that he was not the primary caregiver. We are not left with a definite and firm conviction that a mistake was made by the trial court when it described the parties' marital arrangements as "atypical." The factual finding merely described what the trial court determined to be a circumstance where the parties each had significant house-keeping and parenting roles. Plaintiff indeed worked outside the home while defendant stayed at home and did 85% of the housework. But the record demonstrated that plaintiff also was required to delegate the housekeeping tasks to defendant, monitor his progress on these tasks, complete additional housework, and care for the children while defendant relaxed when she came home from work. Moreover, we are not left with a definite and firm conviction that a mistake was made by the trial court when it determined that plaintiff had a significant and continuous role in parenting the children, which the trial court characterized as being a "full-time mother." The record supports the trial court's finding that plaintiff's employment did not negate the fact that she provided care for the children when she was not working, took the children to work with her on weekends, and regularly resolved disputes between defendant and the children over the phone even when she was working.

B

Next, defendant claims that the trial court clearly erred when it found that defendant's testimony was inconsistent. The trial court cited defendant's claim that he did not work because he was caring for the children. But there is no dispute that the children were adults at the time of

the divorce proceedings and defendant still had not found work. Moreover, the trial court cited defendant's testimony that he did not work because he was disabled. But defendant also testified that he had not been diagnosed with a condition disabling him from work, he intended to work when the divorce proceedings concluded, and there were probably jobs he could do despite his health problems. In light of these facts, we are not left with a definite and firm conviction that a mistake was made by characterizing defendant's testimony as inconsistent.

C

Last, defendant claims that the trial court clearly erred by finding that plaintiff's earnings were only $112,000 per year with an opportunity for bonuses. Defendant notes that, in 2013, plaintiff's earnings totaled $124,000 after she received a bonus, and he contends she has a higher earning capacity than determined by the trial court. We are not left with a definite and firm conviction that the trial court was mistaken in finding plaintiff's earnings were $112,000, and not imputing income to plaintiff based on her opportunity for bonuses, because plaintiff testified that her employer had not given bonuses for the five years prior to 2013, she did not anticipate another bonus in 2013, and whether she received a bonus was not in her control.

III

Defendant additionally claims that the amount and duration of the spousal support award was inequitable. We disagree. " 'If the findings of fact are upheld, the appellate court must decide whether the dispositive ruling was fair and equitable in light of those facts.' " *Korth*, 256 Mich App at 288, quoting *Sparks v Sparks*, 440 Mich 141, 151; 485 NW2d 893 (1992). Dispositional rulings, including the amount of spousal support awarded, "should be affirmed unless the appellate court is left with a firm conviction that the decision was inequitable." *Id.*

" 'The object in awarding spousal support is to balance the incomes and needs of the parties so that neither will be impoverished; spousal support is to be based on what is just and reasonable under the circumstances of the case.' " *Loutts v Loutts*, 298 Mich App 21, 26; 826 NW2d 152 (2012), quoting *Berger v Berger*, 277 Mich App 700, 726; 747 NW2d 336 (2008). The following factors are considered when awarding spousal support:

> (1) the past relations and conduct of the parties, (2) the length of the marriage, (3) the abilities of the parties to work, (4) the source and amount of property awarded to the parties, (5) the parties' ages, (6) the abilities of the parties to pay alimony, (7) the present situation of the parties, (8) the needs of the parties, (9) the parties' health, (10) the prior standard of living of the parties and whether either is responsible for the support of others, (11) contributions of the parties to the joint estate, (12) a party's fault in causing the divorce, (13) the effect of cohabitation on a party's financial status, and (14) general principles of equity. [*Id.* at 32 (citations and quotation marks omitted).]

A

As the trial court concluded, the parties' 29-year marriage and the fact that defendant was 57 years old at the time of the divorce were proper factors to consider in determining that defendant was entitled to receive an award of spousal support. Cf *Feldman v Feldman*, 55 Mich

App 147; 222 NW2d 2 (1974) (the wife's young age and the six-year marriage weighed against spousal support) and *Wiley v Wiley*, 214 Mich App 614; 543 NW2d 64 (1996) (obtaining employment in one's 50s after having left the workforce is not always attainable).

B

Plaintiff argues that defendant's fault weighed against any additional spousal support he requested, however. The trial court found that the parties had a tumultuous marriage and plaintiff stayed with defendant for the benefit of the children. The psychologist opined that defendant is an emotional batterer. The trial court did not clearly err when it found that defendant's behavior resulted in the breakdown of the marriage, and the trial court properly considered this fact in determining the amount of spousal support to award. We find no error in the trial court's application of this factor to the ultimate spousal support award.

C

When it awarded spousal support, the trial court found that it was "mindful of . . . Husband's . . . ability to work." Although the trial court noted that defendant had not worked for 19 years, it found that defendant had a master's degree and he had previously held jobs in and out of his field. Although defendant testified that he had no idea what type of work he would look for after the divorce, his psychologist testified there are resources that would help him find employment despite his health problems.

As plaintiff argues, the facts here are distinguishable from cases like *Zecchin v Zecchin*, 149 Mich App 723, 726-727, 734; 386 NW2d 652 (1986), where the divorcing parties agreed for the wife to leave the workforce. Here, plaintiff repeatedly encouraged defendant to return to work, and only continued supporting the family alone to protect her family and avoid defendant's emotional abuse. Although the spousal support award is limited to two years, defendant could move to modify it for continued support if he is unable to find work after making a good-faith effort. See MCL 552.28; *Staple v Staple*, 241 Mich App 562, 569; 616 NW2d 219 (2000). Therefore, given the facts that defendant is able to work and he refused to return to work when he was no longer needed as a stay-at-home parent, we find no error in the trial court's application of this factor to the ultimate spousal support award.

D

Although the trial court did not expressly consider plaintiff's contributions of her inheritances to the joint estate, we recognize that plaintiff's inheritances were used as marital property. Under *Dart v Dart*, 460 Mich 573, 585 n 6; 597 NW2d 82 (1999), the trial court could have included defendant's inheritance in the marital estate based on the family's use of plaintiff's inheritances and the family's expectation to use defendant's inheritance when his mother died. But the trial court nevertheless awarded the entirety of defendant's inheritance to him as his separate property. Thus, we find no error in the trial court's application of this factor to the ultimate spousal support award.

E

We further recognize that the trial court's spousal support award could require him to rely on his inheritance for discretionary spending or self-support. Even though the case law defendant cites discourages spousal support awards that require just one party to self-support with the property award, see *Gates v Gates*, 256 Mich App 420; 664 NW2d 231 (2003) and *Hanaway v Hanaway*, 208 Mich App 278, 285-286; 527 NW2d 792 (1995), these cases are clearly distinguishable from the instant case. Here, because the evidence established that plaintiff had shared her inheritances with the family whereas defendant was awarded his inheritance as his own, separate property, it was not inequitable for the trial court to require defendant to rely, in part, on his $177,000 inheritance to support himself during this initial two-year support period. Therefore, we find no error in the trial court's application of this factor to the ultimate spousal support award.

F

Defendant relies on *Lesko v Lesko*, 184 Mich App 395; 457 NW2d 695 (1990), overruled on other grounds *Booth v Booth*, 194 Mich App 284; 486 NW2d 116 (1992), to argue that it was improper to consider plaintiff's support of her daughters when calculating spousal support. In *Lesko*, the trial court awarded $150 per week in permanent spousal support to the wife following a 24-year marriage. The husband earned $49,000 per year and the wife earned $11,000 per year (working as a receptionist after being a stay-at-home parent for much of the marriage). *Id.* at 398. This Court concluded that the trial court improperly cited the wife's voluntary support of her adult children in the marital home when awarding spousal support—"[W]e decline to allow a court to order support for adult children through the back door by alimony where it cannot order it through the front door by child support." *Id.* at 405.

The trial court found plaintiff's expenses totaled $6,900 per month compared to defendant's expenses of $1,161. In her trial brief, plaintiff argued that she lacked the ability to pay spousal support, in part, because she was supporting her adult children (including payments for student loans, food, and Lillian's cell phone). Among the facts the trial court considered in awarding spousal support was plaintiff's "financial support for the parties' college age daughters." Given this Court's holding in *Lesko*, we agree with defendant that the trial court erred by considering plaintiff's financial support of the children when it determined the amount of spousal support to be awarded to defendant.

Despite this error, however, we note that at the time of the divorce proceedings, $50 of plaintiff's $6,900 monthly expenses were incurred in payment of defendant's health insurance premium. Under the judgment of divorce, plaintiff was obligated to pay $500 to $600 in COBRA expenses to maintain defendant's health insurance. Therefore, though the calculation of plaintiff's monthly expenses is reduced when no longer taking into account her support of the children, the post-judgment increase in COBRA expenses offsets this reduction. Thus, on balance, the trial court did not err in the application of this factor to the ultimate spousal support award.

G

The trial court found that plaintiff is in good health. Although defendant suffers from anxiety, depression, and requires the use of a cane because of his knee problems, the trial court found that his condition does not prevent him from working. Defendant is unlike the wife in *McNamara v McNamara*, 178 Mich App 382; 443 NW2d 511 (1989), whose health prevented her from keeping a job. The trial court did not err in its application of this factor to the ultimate spousal support award.

H

The trial court did not expressly address the prior standard of living of the parties, but it found defendant's monthly budget was $1,161 in "necessities" without including discretionary expenditures. The record demonstrated that, during the marriage, the parties took vacations and plaintiff's budget reflects several hundred dollars per month available for savings, gifts, meals outside of the home, and charitable donations. Although the spousal support award does not provide for discretionary spending, defendant enjoys $177,000 more than plaintiff to supplement the spousal support award and improve his standard of living. We find no error in the trial court's application of this factor to the ultimate spousal support award.

IV

In summary, the length of the parties' marriage and their ages substantiated an award of spousal support. But in light of defendant's fault, plaintiff's contributions to the marital estate, the nature of the property awarded to defendant, and in particular, defendant's ability to work, we are not left with a definite and firm conviction that the amount and duration of the trial court's award was inequitable. As the two-year time period of spousal support comes to a close, defendant is free to present evidence of his efforts to gain employment and any income he has been able to earn, or if he remains unemployed, his documented level of employability or inability to work, all of which is evidence the trial court may properly consider if defendant chooses to seek a modification of the spousal support award.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens